FILED
DEC 14 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 866

MORRIS DUBIN,

Petitioner,

against

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

J. FREDERIC TAYLOR,
JAMES B. BURKE,
Attorneys for Petitioner.

Of Counsel:
GEORGE HARRIS
FRANK X. O'DONNELL, JR.
BURKE & BURKE

INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT	3
REASONS FOR WRIT	7
CONCLUSION	11
APPENDIX A	1a
APPENDIX B	1b
APPENDIX C	1c

CITATIONS

CASES:

	PAGE
Armstrong v. *United States*, 364 U. S. 40, 49 (1960)	10
Turney v. *United States*, 115 F. Supp. 457 (Ct. Cl. 1953)	10
United States v. *Miller*, 317 U. S. 369 (1943)	10

STATUTES:

Espionage Act:

18 U. S. C. § 793(d), (e)	2, 6

Federal Property and Administrative Services Act of 1949:

40 U.S. C. § 471	8
40 U. S. C. § 472 (e)	2, 8
40 U. S. C. § 472 (g)	3, 8
40 U. S.C. § 484 (d)	9

Judiciary and Judicial Procedure, §7:

28 U. S. C. § 1255(1)	1
28 U. S. C. § 1491	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. _____

MORRIS DUBIN,
Petitioner,
against
UNITED STATES,
Respondent.

Morris Dubin petitions for a Writ of Certiorari to review the judgment of the United States Court of Claims entered in this case on July 18, 1966.

Opinions Below

The opinion of the Court of Claims (App. 1a-33a) is reported at 363 F. 2d 938 (Ct. Cl. 1966). A prior opinion of the Court of Claims denying cross motions for summary judgment (App. 1b-6b) is reported at 289 F. 2d 651 (Ct. Cl. 1961).

Jurisdiction

The Judgment of the Court of Claims sought to be reviewed (App. C) was dated and entered July 18, 1966. On October 13, 1966, Mr. CHIEF JUSTICE WARREN signed an order extending petitioner's time for filing a petition for Writ of Certiorari to and including December 15, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. § 1255(1).

Questions Presented

1. Where a citizen innocently purchases surplus property from the Air Force under the provisions of the *Federal Property and Administrative Services Act of 1949*, and thereafter, despite knowledge of the impending sale and failure to object to it, the Navy seizes the goods on the ground they relate to the national defense under the Espionage Act, is the citizen entitled to compensation for the seizure?

2. If the answer to the previous question is in the affirmative, is the citizen's measure of damages limited to his direct out-of-pocket expenditures or may he recover fair value?

Constitutional Provisions and Statutes Involved

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "* * * nor shall private property be taken for public use, without just compensation."

Section 793 of *Espionage Act*, added by ch. 645, 62 Stat. 737 (1948) (now 18 U. S. C. § 793(d), (e), 1964)), provides in pertinent part:

> "Whoever, lawfully or unlawfully having possession of, access to, control over, * * * any document * * * instrument, appliance, or note relating to the national defense, willfully communicates or transmits or attempts to communicate or transmit the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; * * * Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Section 3(e) of *Federal Property and Administrative Services Act of 1949*, 63 Stat. 378 (1949), 40 U. S. C. § 472(e) (1964) provides in pertinent part:

> "The term 'excess property' means any property under the control of any Federal agency which is not required for its needs and the discharge of its responsibilities, as determined by the head thereof."

Section 3(g) of *Federal Property and Administrative Services Act of 1949*, 63 Stat. 379 (1949) 40 U. S. C. § 472(g) (1964) provides in pertinent part:

> "The term 'surplus property' means any excess property not required for the needs and the discharge of the responsibilities of all Federal agencies, as determined by the Administrator."

Section 203(d) of *Federal Property and Administrative Services Act of 1949*, 63 Stat. 385, 386 (1949), 40 U. S. C. 484(d) (1964) provides in pertinent part:

> "A * * * bill of sale, * * * executed by or in behalf of any executive agency purporting to transfer title or any other interest in surplus property under this title shall be conclusive evidence of compliance with the provisions of this title insofar as concerns title * * * of any bona fide * * * transferee for value and without notice of lack of such compliance."

Statement

In July, 1950, petitioner, Morris Dubin, who formerly operated a small grocery store, made his first purchase of government surplus property. Acting pursuant to a public invitation to bid issued by the United States Air Force, he purchased a large lot of surplus electronic equipment from the Air Force at a public sale held at an Air Force Depot at Dayton, Ohio. (App. 2a; Fn.* 10, App. 13a)

Prior to bidding on the equipment, petitioner and other private bidders were permitted freely to examine it. (Fn. 7; App. 12a) It was obvious to petitioner and everyone else that this was military equipment, as were the huge

---

* "Fn." refers to findings of Court of Claims.

mounds of other equipments offered for sale at the same time at the Air Force Depot. There were no markings on the goods, or on the boxes in which most of them were packed, indicating that any of the goods had a then present relationship to the National Defense, (Fn. 8; App. 12a) and there was nothing in the circumstances of the sale or otherwise to warn the petitioner that two of the types of radar equipment he purchased had been, respectively, radar components of the Bat and Pelican missiles, and that their possession could trigger criminal consequences under the *Espionage Act.*

Petitioner received a bill of sale for the equipment signed by the Air Force contracting officer stating that the contract was authorized by Public Law 152-81st Congress. (Fn. 10(a); App. 13a)

The contract also included a clause as follows:

> "Article 14. *Use warranty.*—The purchaser represents and warrants that it will use or consume the property covered hereby in the United States for manufacturing, construction, maintenance, or repair purposes, and the purchaser agrees that if it does not use or consume any of the items, it will not resell them at a profit."

The Bat and Pelican were missiles developed by the Navy early in World War II. Before it offered these radar components for public sale as surplus property, the Air Force, of course, notified the Navy that they were to be sold, and the Navy expressed no need for the equipments and made no objection to their sale as surplus. (Fn. 6; App. 11a)

During the course of the Air Force sale, petitioner learned that one Sellatti owned certain power supply units which were accessories for one of the types of radar equipment which he had purchased at the Air Force sale. Petitioner purchased these accessory power supplies from Sellatti. (Fn. 13; App. 14a) Thereafter, petitioner learned

that another private company had certain dynamotor power units which were accessories to a second type of radar which he had purchased from the Air Force. Petitioner purchased one of the latter dynamotor power units under an arrangement allowing him to purchase additional power units for each of his second type of radar sets. (Fn. 14; App. 14a)

Petitioner then prepared a brochure describing and picturing these equipments, among other radar and electronic equipment which he offered for sale at retail, and listed retail prices for each. (App. 3a 4a)

After some 11,000 of these brochures had been mailed to potential customers, on August 16, 1960, officers of the United States Navy announced to petitioner that he had to stop mailing these brochures and could not sell the equipment because two of the types advertised (which he had purchased from the Air Force) and their associated power supplies (purchased from two different private parties), related to the National Defense under the *Espionage Act.* (App. 4a)

This was the first time the petitioner learned of any claim by anyone that any of these goods related to the National Defense or that anyone objected to their resale. (Fn. 18; App. 16a)

The Navy thereupon seized the equipments from the petitioner, but signed receipts for them acknowledging petitioner's right to just compensation. (App. 4a)

In 1955, petitioner instituted this action in the Court of Claims, invoking its jurisdiction under *Judiciary and Judicial Procedure,* § 7, added by ch. 253, 67 Stat. 226 (1953) (now 28 U. S. C. § 1491 (1964)). He claimed that he secured good title to the two types of radar in issue by statute:

> "A . . . bill of sale . . . executed . . . on behalf of any executive agency purporting to transfer title . . . in surplus property under this title shall be conclusive evidence of compliance with the provisions

> of this title insofar as concerns title . . . of any bona fide . . . transferee for value and without notice of lack of such compliance." *Federal Property and Administrative Services Act of 1949*, § 203(d), 63 Stat. 385, 386 (1949), 40 U. S. C. § 484(d) (1964).

and had secured good title to the accessory power supplies by virtue of state sales acts. He demanded just compensation for the seizure of his equipment under the Fifth Amendment to the Constitution, and, in the alternative, demanded contract damages arising out of receipts signed by the Navy. On both claims, he asserted that the fair value of the seized equipment was evidenced by the retail prices of the goods as he had advertised them for resale, prior to their seizure.

The government asserted that all the equipment seized from petitioner related to the National Defense under the *Espionage Act* that the *Espionage Act* made it unlawful for the petitioner to retain the equipment, and therefore, since he had no right to retain it, he was entitled to no compensation for its seizure. The pertinent provisions of the *Espionage Act* read, at time of the seizure:

> ". . . Whoever, lawfully or unlawfully having possession of, access to, control over, . . . any document . . . instrument, appliance, or note relating to the national defense, willfully communicates or transmits or attempts to communicate or transmit the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; . . . Shall be fined not more than $10,000 or imprisoned not more than ten years, or both." *Espionage Act*, § 793, added by ch. 645, 62 Stat. 737 (1948) (now 18 U. S. C. § 793(d), (e) (1964)).

It is also asserted that the goods petitioner had purchased from the Air Force were subject to the so-called "Use Warranty" which limited petitioner's right to recovery.

In 1960, petitioner moved for summary judgment on all issues except damages, and the government cross-moved for complete summary judgment.

The Court of Claims denied both motions. (App. 1b-6b) It held that, if the goods related to the National Defense under the *Espionage Act,* petitioner's title to them "was completely vulnerable" and, analogizing his possession to possession of narcotics, the Court stated ". . . . the possessor is not entitled to compensation for their loss, unless a statute provides for compensation." (App. 5b-6b) Notwithstanding, the Court of Claims stated petitioner ought to secure ". . . . a refund of his direct out-of-pocket expenditures in the above abortive transaction." (App. 6b)

The Court of Claims then directed trial before a Commissioner of the issue of whether the goods related to the National Defense and, subsequently, the amount of damages petitioner was entitled to recover if the Court decided he was entitled to recover.

Trial was had before a Commissioner who found that the goods related to the National Defense under the *Espionage Act,* both because they were the subjects of proper security classifications at the time of their seizure and because they were components of the Bat and Pelican missiles, whether properly classified or not.

On petitioner's exceptions to the Commissioner's findings, the Court of Claims reviewed them and, in large measure, adopted those findings as its own. (App. 1a-33a) It entered judgment in favor of petitioner for limited out-of-pocket expenses, but denied petitioner the right to recover the fair value of the seized equipments.

Reasons For Writ

The decision of the Court of Claims presents an important question of Federal law which has not been, but should be, settled by this Court as to the measure of damages recoverable by a party innocently purchasing surplus

property under the *Federal Property and Administrative Services Act of 1949*, which is thereafter seized by the government because it relates to the National Defense under the *Espionage Act*.

Moreover, it raises the question of whether plaintiff was deprived of just compensation by the Court's refusal to grant him the fair value of the seized property. The decision of the Court of Claims conflicts with the Congressional policy of establishing an economical and efficient system of disposing of government property sold as surplus property embodied in the *Federal Property and Administrative Services Act of 1949*, 63 Stat. 377 (1949), 40 U. S. C. § 471 (1964). If allowed to stand, it will severely curtail the government's receipts on future sales of surplus property. With the conclusion of the War in Viet Nam, the government will have to offer thousands of items of surplus military equipment for sale. No one will bid more than a pittance for these items because, under the Court of Claims decision at bar, no one can know whether any particular item of military equipment he purchases relates to or will be unilaterally claimed so to relate to the National Defense by some other branch of the Government, and on seizure thereof he will be limited to recovery of only his direct out-of-pocket expenses regardless of the fair value of the equipment.

The Federal Property and Administrative Services Act of 1949 directs that a Federal Agency can declare government property as surplus only after the head of the agency determines that it is neither required for the needs of the agency nor for the discharge of its responsibilities, *Federal Property and Administrative Services Act of 1949*, § 3(e), 63 Stat. 378 (1949), 40 U. S. C. § 472(e) (1964) and after an Administrator determines that it is not required for the needs and discharge of responsibilities of all other Federal Agencies. *Federal Property and Administrative Services Act of 1949*, § 3(g), 63 Stat. 379 (1949), 40 U. S. C. § 472(g) (1964).

This was done here. (Fn. 6; App. 11a-12a)

Of course, when the Air Force thereafter sold two types of radar to petitioner, concededly an innocent purchaser, under a bill of sale he received good title to the equipment under the Act:

> "A . . . bill of sale . . . executed . . . on behalf of any executive agency purporting to transfer title . . . in surplus property under this title shall be conclusive evidence of compliance with the provisions of this title insofar as concerns title . . . of any bona fide . . . transferee for value and without notice of lack of such compliance." *Federal Property and Administrative Services Act of 1949*, § 203(d), 63 Stat. 385, 386 (1949), 40 U. S. C. § 484(d) (1964).

He also received good title to the accessory power supplies purchased from private parties, as a matter of state law.

The Court of Claims therefore erred when it held that because of the provisions of the *Espionage Act*, plaintiff's title was "completely vulnerable" and that petitioner, whose goods were seized ". . . is not entitled to compensation for their loss." (App. 5b-6b).

It is interesting to speculate but, for the purposes of this petition, irrelevant whether a mistake was made by the Air Force or by the Navy, or whether the goods related to the National Defense because they were the subject of a properly applied security classification or for other reasons. (See Concurring Opinion of Judge Davis, App. 8a-9a.) Prior to the seizure the petitioner had no knowledge of these matters, and any actions taken or not taken by any agency of the government prior to seizure were done or omitted without his fault.

The government, because it is the sovereign, had the power to seize the goods, but its reasons and authority for making the seizure should not serve to limit petitioner's right to just compensation. The Fifth Amendment con-

tains no proviso giving the government the right to take private property for public use without just compensation whether the property relates to the National Defense or otherwise. Yet the Court of Claims held here, both with respect to the property petitioner purchased from the Air Force and that which he purchased from private parties, that he was not entitled to just compensation for the taking, contrary to prior decisions of this Court:

> "The Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States,* 364 U. S. 40, 49 (1960).

Furthermore, the holding of the Court of Claims was in conflict with its own earlier decision in *Turney* v. *United States,* 115 F. Supp. 457 (Ct. Cl. 1953), which it attempted to distinguish on the erroneous ground that there was no *Espionage Act* in effect at the time of *Turney,* even though that statute had been in effect in all material respects since 1917. (App. 5b)

It is true that having denied petitioner any right to compensation for this taking, the Court of Claims did then decide petitioner had an "urgent equity" in getting back his direct out-of-pocket expenses (App. 6b), but while this is some compensation, it is not "just compensation." *United States* v. *Miller,* 317 U. S. 369 (1943).

Petitioner should have the right to prove the fair value of the seized property and should not be limited in his right to damages by a contrived ruling that his title to his goods was destroyed by the *Espionage Act,* so that "private property" referred to in the Fifth Amendment was not seized. The fact that the government has thrown petitioner the bone of his direct out-of-pocket expense as so much largesse, should not bar petitioner from receiving the full and proper measure of damages provided for by the Constitution of "just compensation."

The "use warranty" clause of the Air Force contract was inapplicable; as pointed out by Judge Davis, it was implicitly decided by the Court of Claims on the summary judgment motion that if the equipment did *not* relate to the National Defense, plaintiff could recover market value and not merely out-of-pocket expenditures notwithstanding that clause. (App. 9a) (Of course, the clause did not affect the accessory equipment petitioner purchased from private parties.)

Really, Judge Davis did not go far enough. For it is petitioner's contention, and this Court should so rule, that the measure of damages should be the same whether the goods related to the National Defense or not, since petitioner had no knowledge of such status. The measure of "just compensation" should not depend on a fortuitous circumstance of internal procedures by the military services.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES B. BURKE,
J. FREDERIC TAYLOR,
Attorneys for petitioner.

Of Counsel:
GEORGE HARRIS
FRANK X. O'DONNELL, JR.
BURKE & BURKE

APPENDIX A

In the United States Court of Claims

No. 68-55

(Decided July 15, 1966)

MORRIS DUBIN v. THE UNITED STATES

George Harris for plaintiff; *Frank X. O'Donnell, Jr.*, attorney of record. *Burke & Burke*, of counsel.

Robert R. Donlan, with whom was *Assistant Attorney General John W. Douglas*, for defendant.

Before COWEN, *Chief Judge*, WHITAKER, *Senior Judge*, LARAMORE, DURFEE, and DAVIS, *Judges*.

OPINION

WHITAKER, *Senior Judge*, delivered the opinion of the court:

This case was originally before the court on cross-motions for summary judgment. On May 3, 1961, in an opinion delivered by Judge Madden, the court denied both motions and referred the case to the trial commissioner on the limited issue of "whether the articles here in question related to the national defense * * *." *Dubin* v. *United States*, 153 Ct. Cl. 550, 556, 289 F. 2d 651, 655 (1961). Subsequently, on motion of both parties, the court, by order dated March 19, 1962, amended its order of reference to authorize the trial commissioner to hear proof on the following issues:

(a) Whether the articles of property involved in this action related to the national defense;

(b) The amount of damages that plaintiff is entitled to recover in the event the court decides that plaintiff is entitled to recover; and

(c) Any other material issues of fact, as determined by the trial commissioner, which need to be resolved in order to close proof in this case; * * *.

Thereafter, the case proceeded to trial and is now before the court on exceptions to the Report of Trial Commissioner Franklin M. Stone.

The genesis of the dispute involved herein was the requirement by the defendant, acting through officials of the United States Navy, that plaintiff surrender possession to it of a number of radar-transmitter units, accessory power units, and radar receivers. At the time the equipment was taken, receipts were given by the Navy Department stating that the transaction was without prejudice to plaintiff's rights, including his full right to compensation. Shortly thereafter, plaintiff presented to defendant a claim for $85,612.50, which he asserted was the fair market value of the property taken. The defendant denied the claim but offered to refund to plaintiff $3,162.62, the amount which it had received from plaintiff as the purchase price for a lot of surplus property which contained many of the repossessed items. Plaintiff rejected the offer and thereafter filed a petition in this court claiming damages of $85,612.50.

Somewhat prior to the purchase of the surplus property involved in this suit, plaintiff entered into an arrangement with his brother, Lester Dubin, whereby his brother would advise him, and his brother's company, the Dubin Electronics Company, Inc., would act as his sales agent on the purchase and sale of surplus property. As compensation for the advisory services of Lester Dubin, and for the services of Dubin Electronics, the company was to receive one-third of the sales price.

In the latter part of June or early July 1950, Lester Dubin received a copy of a notice that the United States Air Force was going to conduct a public sale of approximately 50 lots of surplus electronic equipment at Dayton, Ohio, from July 5, 1950 to July 11, 1950. Plaintiff and his brother decided that they should both go to Dayton for the sale. At the sale the equipment had been divided into lots and a sample of each significant type of equipment in each lot had been taken out of its package to permit examination. After examining the lots, Lester Dubin advised plaintiff to enter certain bids

for certain lots. In accordance with the above, plaintiff submitted sealed bids for six different lots. He was the high and successful bidder on four lots, among which was Lot No. 23, the only lot material to this case. This lot contained, among other things, 83 Mark 31 Model 1, "S" Band radar transmitter-receiver units and 136 Mark 1 Model 2, "S" Band radar receivers, type CG-46ACX, which had been purchased from the Navy by the United States Army Signal Corps in Dayton, Ohio, during 1944.

The equipment contained in Lot No. 23 was shipped from Dayton, Ohio, on July 12 and 13, 1950, and was received by plaintiff in New York on or about July 30, 1950.

At the sale in Dayton, Lester Dubin met a representative of Fair Radio Sales who informed him that it had been the successful bidder on a lot of property which contained equipment complementary to the Mark 31 Model 1, known as the PU/Mark 31 power supply unit, which it was willing to sell. After examining a sample sent him at his request, Lester Dubin, acting on behalf of plaintiff, on August 8, 1950, purchased it and eighty additional PU/Mark 31 power supply units from Fair Radio Sales for a total price of $1,600. On August 10, 1950, Dubin Electronics also purchased, on behalf of plaintiff, one sample of a dynamotor power unit from Western International Co. for $15. This power unit was purchased under an arrangement whereby an additional 135 of them could be ordered by plaintiff as he might need them as accessory units for the Mark 1 Model 2 radar receivers.

Near the end of July 1950, Lester Dubin prepared an advertising bulletin for the purpose of offering certain goods for sale to Dubin Electronics' customers. Among other things, the bulletin offered for sale two items with which we are concerned. One was the Mark 31 Model 1, purchased from the Air Force, plus the PU/Mark 31 power supply unit purchased from Fair Radio Sales. The other was the Mark 1 Model 2, purchased from the Air Force, plus the dynamotor power unit purchased from Western International Co. These items offered for sale had been altered by plaintiff in no particular, but were offered for sale in the cartons in which they were packed when plaintiff purchased them. However, the first item, consisting of Mark 31 Model 1 plus the PU/Mark 31, was offered at the unit price of $750;

but the Mark 1 Model 2 was offered at the price of $175, and the dynamotor power unit to be used in connection with it was offered as a separate item for $37.50. Between August 11, 1950 and August 16, 1950, approximately 11,000 copies of the advertising bulletin were circulated to customers of Dubin Electronics.

Shortly after the advertising bulletin was circulated, it came to the attention of certain officials in the Bureau of Aeronautics, Department of the Navy. These officials requested the Third Naval District in New York City to stop all sales of the equipment and conduct an investigation of the matter. In accordance with this request, the Department of the Navy notified Dubin Electronics to cease mailing the advertising bulletin and not to sell the equipment described as Mark 31 Model 1, and Mark 1 Model 2 or their associated power units, because they were classified equipment. Plaintiff and his agents complied immediately with this notice. Shortly thereafter, officials of the Navy Department informed plaintiff that there was a security violation involved and that the Navy intended to seize the equipment. They further informed plaintiff that he should cooperate with their effort to repossess the equipment, as continued possession of it might constitute a violation of the Espionage Act, 62 Stat. 736, 737 (1948) (now 18 U.S.C. § 793 (1964)). As the Korean conflict was then in progress and plaintiff was concerned over a possible violation of the Espionage Act, he offered no resistance to the repossession of the equipment. Thus, on August 19, 23, and 24, 1950, the Navy took from plaintiff 83 Mark 31 Model 1, "S" Band radar transmitter-receiver units, 81 PU/Mark 31 power supply units, 136 Mark 1 Model 2, "S" Band radar receivers, type CG-46ACX, and one dynamotor power unit, type CG-211078.

At the trial before the trial commissioner, it developed that the Mark 1 Model 2 and the dynamotor power unit were components of the "Pelican" missile. The Pelican missile was the first radar homing missile developed by the United States Navy. It was known as a semi-active, or passive homing missile, because it contained only a radar receiver but not a transmitter. It homed on its target by using radar signals emitted by a transmitter carried in an associated

aircraft. The Mark 1 Model 2 was one of three design versions of the radar receiver for the guidance system of the Pelican missile and the dynamotor power unit was the power supply for the radar receiver. It also developed at the trial that the Mark 31 Model 1 and the PU/Mark 31 power supply unit were components of the "Bat" missile. The Bat (upon which the Navy began to concentrate its efforts in late 1944, when, except for some experimental purposes, the Pelican project was discontinued), like the Pelican, was an air-to-surface type of homing missile. Unlike the Pelican, however, the Bat was an active or self-illuminating homing missile, since it contained both a radar transmitter and a receiver and thus was independent of an associated aircraft.

During August 1950, the Bat missile was an operational weapon in the United States defense arsenal. Possession of its radar guidance and homing system, *i.e.*, Mark 31 Model 1 and the PU/Mark 31 power supply unit, would have allowed a skilled electronics expert to reconstruct the circuit diagrams with which he would have been able to determine how the system worked and build similar circuits. Furthermore, such an expert, in all probability, would have been able to ascertain from physical examination of the guidance system, the method or technique used to actuate the mechanism by which the direction of the missile was changed to accord with a change in direction of the target, so that the missile would home in on a moving target. This tracking device was the only one of its type available in 1950. There is little doubt that possession of the Bat guidance and homing system would have given to an unfriendly foreign power valuable, and otherwise unavailable, advanced technical information concerning missile guidance systems then in use.

Although the Pelican missile was not operational during 1950, the receiver portion of the missile, *i.e.*, Mark 1 Model 2, worked in the same manner and performed the same functions as the receiving portion of the Bat missile. Both receivers contained the mechanism by which the direction of the missile was changed to accord with a change in the direction of the target. These mechanisms, known as tracking circuits, were identical in the radar systems of both the Pelican and Bat missiles. Possession of the Pelican receiver

would have revealed important technical information about guidance systems of then operational missiles and in all probability would have advanced missile guidance technology of a potential enemy.

While it may be said that commercial radar available to the general public in 1950 operated on the same basic radar laws as the instruments repossessed, these instruments, being components of the Pelican and Bat missiles, contained a number of elements not found in commercial radar or on the commercial market; in particular the homing devices, by which the missiles changed course with a change in course of the target, were unknown to the general public during the year 1950.

Based simply on the foregoing, we would have little difficulty in finding that the instruments repossessed by the Department of the Navy were "instruments" or "appliances" "relating to the national defense" as those terms were used in section 793 of the Espionage Act in effect during August 1950 (62 Stat. 736, 737 (1948) (now 18 U.S.C. § 793 (1964)), which made it unlawful for anyone having possession of an "instrument" or "appliance" "relating to the national defense" to refuse to surrender possession thereof on lawful demand.

Moreover, the defendant also proved by competent evidence at the trial and our trial commissioner so found that the equipment seized by the Navy Department was "classified" in the security sense of the word,[1] *i.e.*, the guidance system equipment of the Pelican missile—Mark 1 Model 2 and the dynamotor power unit—was classified "Restricted" in August 1950, and the guidance system equipment of the Bat missile—Mark 31 Model 1 and the PU/Mark 31 power supply unit—was classified "Confidential" in August 1950. Classification in the security sense simply means a decision made by proper authority in the Department of Defense to put a piece of defense information or material into a specific category that then makes it subject to the current regulations regarding safeguarding and dissemination. The purpose of the classification system is to safeguard information from becoming known to potential enemies of the United States in the interest of national defense.

---

[1] See findings 30–40, *infra*.

The fact that the equipment repossessed was classified by the proper authority, coupled with the very nature of the equipment itself, leaves no room for doubt that it was related to the national defense. We hold that the 136 Mark 1 Model 2, "S" Band radar receivers, the dynamotor power unit, the 83 Mark 31 Model 1, "S" Band radar transmitter-receiver units and the 81 PU/Mark 31 power supply units repossessed from plaintiff by the Navy Department were "instruments" or "appliances" "relating to the national defense" within the meaning of section 793 of the Espionage Act.

It follows from section 793 that plaintiff's title to and possession of this equipment were "completely vulnerable." *Dubin* v. *United States*, *supra*. All that was required to destroy them was a demand for possession by a proper official. A refusal to deliver the equipment on demand would have been a serious crime. Plaintiff, however, turned over possession of the equipment when the demand was made, but he insists that he is entitled to the fair market value of the property taken.

The contract between plaintiff and the defendant for the purchase of Lot No. 23, which contained the 83 Mark 31 Model 1, "S" Band radar transmitter-receivers and the 136 Mark 1 Model 2, "S" Band radar receivers, contained a "Use Warranty" clause, by which the plaintiff warranted that he would not resell the purchased property at a profit. *Dubin* v. *United States*, *supra*. This clause limited the sales price which plaintiff could charge for any of the property which he purchased under the contract to his cost. We think it necessarily follows that it also limited the amount which the defendant was required to pay upon repossession of the property. So far as these items are concerned, we need not consider the effect of section 793 of the Espionage Act on the amount of plaintiff's recovery nor the "Use Warranty" clause in the contract except as indicated above, because defendant states that it is willing to have judgment entered in favor of the plaintiff for $3,162.62, the purchase price for Lot No. 23. It also states that it is willing for judgment to be entered for $1,600, the purchase price of the 81 PU/Mark 31 power supply units which plaintiff purchased from Fair Radio Sales, plus $173.86, the cost of transportation, and for $15, the cost

of the dynamotor power unit which he purchased from Western International Co.

Since the 81 PU/Mark 31 power supply units and the dynamotor power unit were purchased by plaintiff from private parties in arm's-length transactions between a willing buyer and a willing seller only eleven days before repossession by defendant, what plaintiff paid would seem to be the market value of these articles. Again, we think it unnecessary to consider the effect of the Espionage Act on the market value of these articles, although it is evident that it severely restricted the extent of the market.

Since defendant agrees to reimburse plaintiff for his out-of-pocket costs, we think under all the circumstances this is not only just compensation to plaintiff but is also the amount defendant is justly due to pay.

Plaintiff is entitled to recover $4,951.48. Judgment is entered to that effect.

DAVIS, *Judge*, concurring in the result:

I do not join in the court's opinion because, first, of the apparent holding that retention of the equipment involved here would have violated the Espionage Act even if the items were all unclassified, and, second, of the wholly unnecessary reliance on the "use warranty". I concur in the judgment because the items were in fact classified and, that being so, plaintiff is entitled, under our prior decision in this case, 153 Ct. Cl. 550, 289 F. 2d 651 (1961), to recover only what he paid.

I have the gravest doubt that the controlling provision of the Espionage Act (now 18 U.S.C. § 793) could ever apply to surplus materials or equipment which the armed services sold after properly declassifying or failing to classify them. The crucial fact of declassification (or initial failure to classify) would seem to show, in itself, that the purchaser need not fear that he would trespass on the Act by keeping the goods. This is a serious criminal provision and we must be very cautious in extending it to surplus items which the public (including the purchaser) has been told, in effect, by the Defense Department need not be kept from unfriendly hands and eyes but may be revealed to all.

It is unnecessary, however, to decide that point since the equipment here was actually classified (as the court also holds, correctly but alternatively). The trial commissioner has found the items classified and I see no adequate reason for rejecting that factual conclusion. Plaintiff has made much of a listing ("46ACX") said to show that one of the major pieces of equipment was unclassified, but I am not at all persuaded that this listing applied to any of the goods involved in this case. There is no testimony to that effect; there are apparent divergences from the particular equipment before us; and there is considerable affirmative testimony that the items sold to plaintiff were in fact classified and never removed from that category.

As for the "use warranty", our earlier decision must have decided that that clause was inapplicable—the issue was distinctly raised at that time, see 153 Ct. Cl. at 553, 289 F. 2d at 653—since the court held, implicitly, that if the equipment did *not* relate to the national defense the plaintiff could receive market value, not merely his expenditures. If the "use warranty" limited recovery, whatever the event, to the plaintiff's costs (which the defendant was even then willing to pay), there would be no need for an elaborate trial; the case could and would have been disposed of by summary judgment five years ago in 1961. Under the law of the case, therefore, the "use warranty" is irrelevant. It is also irrelevant because the court specifically held in 1961, without any reliance on the "use warranty", that, if the property turned out to be related to national defense (within the meaning of the Espionage Act), the plaintiff was entitled to "a refund of his direct out-of-pocket expenditures in the abortive transaction." 153 Ct. Cl. at 556, 289 F. 2d at 655. That is exactly what the court awards today.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner Franklin M. Stone, and the briefs and argument of counsel, makes findings of fact as follows:

223-667—66——2

I

Business Arrangements Between Plaintiff and Dubin Electronics Company, Inc.

1. During the period 1946 through 1950, defendant held public sales of quantities of surplus electronic and radar equipment. Defendant generally advertised these sales to various dealers in surplus property, through mailing lists maintained by various government agencies and in newspapers such as the Government Surplus Sales Record or the Government Daily. These advertisements invited prospective purchasers to attend the sales, examine the goods and bid thereon. During the year 1950, dealers in surplus property were mailed notices of sales by the government announcing sales of surplus property, including airborne radar equipment, and soliciting offers to bid on the equipment.

2. Generally the goods offered for sale were in mixed lots containing several different types of equipment. Usually one sample of each type of equipment in the mixed lot was open for inspection by dealers. Purchasers were not permitted to test the equipment prior to purchase and did not know whether it would work. The government did not warrant that surplus property would perform any particular function or that it would be operable.

3. Plaintiff's younger brother, Lester Dubin, had been in the business of purchasing surplus electronic equipment from defendant and its agencies, individually, and later as president of Dubin Electronics Company, Inc. (sometimes hereinafter referred to as "Dubin Electronics"), Corona, New York, from 1946 through 1950, and he had attended a number of sales of surplus property held by defendant or its agencies during this period.

4. During the period 1946 through 1950, Dubin Electronics Company resold surplus electronic equipment by means of advertisements placed in various trade journals of the electronics trade. The company also sent descriptive, direct mail advertisements to government laboratories, industrial firms, colleges and universities, and to individuals. Various laboratories of the United States Navy were included in the list of addresses to which Dubin Electronics Company reg-

ularly sent direct mail advertisements. The advertisements published and circulated by Dubin Electronics produced purchase orders for the goods advertised, from industrial organizations and government agencies, without prior examination of the equipment by the purchasers. Companies which ordered goods from the company on this basis included, *inter alia*, Western Electric Company, Radio Corporation of America, Bell Laboratories, Westinghouse, Bendix, Hughes Air Craft, and International Business Machines.

5. Plaintiff had been in the grocery business for a number of years prior to 1950; however, he sold his grocery business and was unemployed immediately before the time he purchased the surplus equipment involved in this suit. Early in 1950, plaintiff's brother, Lester Dubin (mentioned in finding 3, *supra*), suggested to plaintiff that he purchase some surplus material and try to develop a surplus property business. Sometime prior to July 1950, plaintiff entered into an arrangement with Lester Dubin whereby the latter agreed to advise plaintiff as to surplus property he might purchase and the prices to pay for it. It was agreed that Dubin Electronics would act as sales agent for plaintiff in reselling surplus property purchased by plaintiff and would incorporate descriptions thereof in its direct mail advertising bulletins. Plaintiff was told he would have to rent warehouse space in which to store goods after purchase and prior to resale. Dubin Electronics Company was to receive one-third of the sales price as compensation for the advisory services of Lester Dubin and for acting as sales and advertising agent for plaintiff.

6. Prior to July 5, 1950, the 862d Air Force Specialized Depot, Wilmington Pike, Dayton 10, Ohio, circularized a notice that a public lot sale of approximately 50 lots of surplus electronics equipment, described as Sale No. UI–51–I, would be conducted at said depot, from July 5, 1950 through July 11, 1950. A copy of that notice was received by Lester Dubin and he showed it to plaintiff. Prior to July 12, 1950, the United States Air Force, pursuant to the provisions of the Federal Property and Administrative Services Act of 1949, notified the United States Navy of the proposed surplus sale. That notice included information concerning the proposed sale of the Mark 31 Model 1 and Mark 1 Model 2 equipments

here in issue. The Navy, informed of the impending sale as required by said Act, *supra*, indicated no requirements by the Navy for said equipment. There is no evidence in the record that the Navy made any effort to prevent the Air Force from selling the equipment here involved.

7. Early in July 1950, plaintiff and Lester Dubin proceeded together from New York to the site of the surplus sale being held by the Air Force at Dayton, Ohio. The equipment the Air Force offered for sale was piled on an open field covering many acres. The equipment was divided into lots, each on a separate part of the field, and samples of each significant type of equipment in each lot had been taken out of their packages which permitted examination of the samples by prospective bidders. Plaintiff and Lester Dubin were permitted to, and did, examine various of the lots of property offered for sale. They ascertained the condition of the equipment and identified it. Other potential bidders made similar examinations of the lots of property on the grounds.

8. One lot of the surplus property equipment offered for sale by the Air Force was designated as Lot No. 23. This lot contained certain electronic equipment, described as Mark 31 Model 1 and Mark 1 Model 2 equipment, as well as additional equipment, including AN/APG–13B SCANNER MOUNTS. Potential bidders freely examined the equipment in Lot No. 23. The boxes in Lot No. 23 which contained the Mark 31 Model 1 equipment bore markings of those numbers. The boxes containing the Mark 1 Model 2 devices also bore the markings "Manufactured by General Electric U.S. Navy Type CG–46ACX." None of these boxes bore any markings indicating that the contents were classified. The samples of the devices also bore markings on name plates affixed to the equipment. The Mark 31 Model 1 devices were so marked on the name plates. Other devices also had name plates affixed bearing the markings "United States Navy Type CG–46ACX manufactured by General Electric," and Mark 1 Model 2. Various of the tubes in each of these devices bore tube numbers. No markings appeared on the devices indicating they were classified.

9. After examining Lot No. 23 and other lots, Lester Dubin advised plaintiff to enter certain bids for certain of

the lots. In accordance with this suggestion, plaintiff submitted sealed bids for six different lots, including Lot No. 23, on a government bid form provided for this purpose. The bidding form both invited and urged all bidders to inspect the property to be sold prior to submitting bids. It also authorized the Air Force salvage officer to reject all bids which did not represent the best interests of the United States.

PURCHASE AND IDENTIFICATION OF EQUIPMENTS

10. (a) Plaintiff was the high and successful bidder for four lots, including Lot No. 23, which is the only lot material to this case. On July 12, 1950, plaintiff and J. E. Adams, Contracting Officer of the 862d Air Force Specialized Depot, Dayton, Ohio, acting on behalf of the government, signed Contract No. AF 33 (149) s-139 for sale of "surplus electronic material" under which plaintiff purchased, for a total consideration of $3,162.62, the property contained in "Lot No. 23, consisting of radar domes and cable."[1] The contract contains, *inter alia*, the following provision: "This contract is authorized by Public Law 152-81st Congress."[2]

(b) Plaintiff's contract of sale contains, *inter alia*, the following provision:

> Article 14. *Use warranty.*—The purchaser represents and warrants that it will use or consume the property covered hereby in the United States for manufacturing, construction, maintenance, or repair purposes, and the purchaser agrees that if it does not use or consume any of the items, it will not resell them at a profit.

11. The equipment actually contained in Lot No. 23, purchased by plaintiff under Contract No. AF33(149)s-139 (finding 10(a), *supra*), consisted of 83 Mark 31 Model 1, "S" Band radar transmitter-receiver units; 136 Mark 1 Model 2, "S" Band radar receivers, type CG-46ACX; a number of AN/APG-13B scanner mounts; ID-108/APS-15-T1 radar indicators; AN/APG-13 inverters; ASB antennas; and some other equipment.[3] The Mark 31 Model 1, "S" Band

[1] See plaintiff's Exhibit No. 2D.
[2] See 40 USC § 484, 63 Stat. 385.
[3] The number of said scanner mounts, indicators, inverters, antennas and units of other equipment included in Lot No. 23 is not disclosed by the record.

radar transmitter-receiver units and the Mark 1 Model 2, "S" Band radar receivers had been purchased from the Navy by the United States Army Signal Corps, Signal Depot, Dayton, Ohio, during 1944. The equipment was shipped directly from the contractor's plant to Dayton, Ohio.

12. The equipment contained in Lot No. 23 was shipped from Dayton, Ohio, on July 12 and 13, 1950, and arrived in New York on or about July 30, 1950.

13. During the course of the sale at which plaintiff purchased Lot No. 23, Lester Dubin met on the sales ground one Selati who represented Fair Radio Sales, located at 132 South Main Street, Lima, Ohio. Selati advised Lester Dubin that he had a complementary piece of equipment to the Mark 31 Model 1 equipment. Lester Dubin asked Selati to send to him in New York a sample of such accessory equipment and Selati did so. This complementary equipment was known as PU/Mark 31 Power Supply Unit. After examining the sample of said power supply unit, Lester Dubin retained it and, on August 8, 1950, purchased on behalf of plaintiff, from Fair Radio Sales, eighty additional PU/Mark 31 Power Supply Units for $20.00 each, or a total price of $1,600. As a result of the above-mentioned business transaction, it appears that plaintiff became the owner of eighty-one of said power units at a total cost of $1,600, as there is no evidence that he paid for the sample unit.

14. On August 10, 1950, Dubin Electronics purchased one sample of a dynamotor power unit, 13-volt DC, from Western International Co., 45 Vesey Street, New York, New York, for $15.00. This power unit had a name plate with the marking "CG-211078". It was purchased under an arrangement whereby an additional 135 of these same units could be ordered by plaintiff as he might require as accessory units for the 136 Mark 1 Model 2, radar receivers purchased by him.

Advertisement for Sale of Equipments

15. In the latter part of July 1950, Lester Dubin prepared an advertising bulletin entitled "Bulletin 83A",[4] for the purpose of offering the goods contained in Lot No. 23, and

[4] A copy of this Bulletin is in evidence as Defendant's Exhibit No. 1.

other goods, for sale to Dubin Electronics customers, potential and existing. The bulletin contained photographs and brief descriptions of the Mark 31 Model 1 and the Mark 1 Model 2 equipments purchased from the Air Force, and descriptions of the PU/Mark 31 power supply units purchased from Fair Radio Sales, and the dynamotor power unit purchased from Western International Company. The Mark 31 Model 1, "S" Band radar equipment depicted in the upper lefthand corner of Bulletin 83A (*ibid.*), together with its power supply, is the radar guidance and homing system of the BAT missile.[5] All of these items were offered for sale at prices indicated. In reselling surplus property to the public it was the common practice of surplus property dealers to offer equipment for sale by means of descriptive advertisements similar to Dubin Electronics Bulletin 83A. In some cases these descriptions had the price of the equipments set next to them. The sales price of each of the equipments advertised in Bulletin 83A and owned by plaintiff was set forth opposite the description of the particular equipment. These prices were set by Lester Dubin in his capacity as sales agent for plaintiff.

16. In early August 1950, the mailing list of Dubin Electronics for its direct mail advertisements contained the names of about 30,000 persons and organizations. Prior to August 11, 1950, Federal Letter Service of New York printed about 30,000 copies of Bulletin 83A. Approximately 11,000 copies were circulated to potential customers of Dubin Electronics Company between the first mailing on August 11, 1950, and August 16, 1950.

17. Sometime subsequent to August 11, 1950, Bulletin 83A, in which Dubin Electronics advertised for sale the equipment involved herein, came to the attention of certain officials in the Bureau of Aeronautics, Department of the Navy, who requested the Third Naval District, New York City, New York, to stop all sales of said equipment, locate any items that had been sold, and conduct an investigation of the matter.

[5] Finding 27, *infra*, describes the nature, characteristics, use and purpose of the BAT missile.

Notice to Plaintiff Not To Sell Equipment

18. About August 16, 1950, the Department of the Navy notified Dubin Electronics Company, Inc., to cease mailing Bulletin 83A and not to sell the equipment described as Mark 31 Model 1, and Mark 1 Model 2, and associated power supplies, because these were classified equipments. This was the first time that plaintiff or his agents learned that the defendant or any of its departments had any objection to plaintiff selling any of the articles contained in Lot No. 23. Plaintiff and his agents complied immediately with the Navy's request to cease mailings of Bulletin 83A and not to sell any of the Mark 31 Model 1, and Mark 1 Model 2 equipments. Shortly after the Navy Department sent said notice, it notified plaintiff's agent that there was a security violation involved and that the Navy intended to seize the equipment. Prior to August 16, 1950, none of these equipments had been sold by the plaintiff.

19. On August 18, 1950, the Bureau of Aeronautics, Department of the Navy, informed the Third Naval District, New York City, New York, that it had positively identified the units offered for sale as BAT missile units, and requested their repossession. On August 19, 1950, the Bureau of Aeronautics informed the said District that the Mark 31 Model 1, "S" Band radar equipment and the Mark 31 power supply constituted a unit which was then classified "Confidential," and further informed said District that the material involved related to the national defense within the meaning of the Espionage Act, 18 U.S.C. § 793. On August 22, 1950, the Director of Naval Intelligence notified the District Intelligence Officer, Third Naval District, that the Mark 1 Model 2, "S" Band radar receiver advertised in Dubin Electronics' Bulletin 83A was then classified "Restricted."

Seizure of Equipments

20. On August 19, 1950, officials of the United States Navy took from Dubin Electronics Company, Inc., 83 Mark 31 Model 1, "S" Band radar transmitter-receiver units, which were new and contained in the original cartons, and one

26½ volt PU/Mark 31 power unit, all of which equipment had been manufactured by Western Electric Company for the Navy, under Contract NOrd 4810. Said transmitter-receivers were part of the property contained in Lot No. 23 purchased by plaintiff from the Air Force at Dayton, Ohio. The power unit was purchased by plaintiff from the Fair Radio Sales Company. On August 23, 1950, the Navy picked up from Dubin Electronics, 80 26½ volt PU/Mark 31 power units contained in their original cartons which had been manufactured by Western Electric Company for the Navy under Contract NOrd 4810. These power units also were purchased by plaintiff from the Fair Radio Sales Company. On August 24, 1950, the Navy picked up from Dubin Electronics, 136 radar receivers, Mark 1 Model 2, "S" Band, Navy type CG–46ACX, in their original containers and one dynamotor power unit, Navy type CG–211078, in its original container, manufactured by General Electric Company under Contract NOrd 965. Said receivers were part of the property contained in Lot No. 23. The power unit was purchased by plaintiff from Western International Company. Prior to taking the above-identified equipment, official representatives of the Navy Department told Lester Dubin that possession of the equipment might constitute a violation of the Espionage Act,[6] and that if plaintiff did not cooperate with the Navy in its efforts to repossess the equipment, a Federal Judge would issue a warrant for its seizure. The Korean conflict was then in progress and both Lester Dubin and plaintiff were concerned over the possibility of their being charged with violation of the Espionage Act.

21. Signed receipts were given by the Navy Department for the equipment taken from plaintiff on August 19, 24 and 25, 1950. Each of the receipts showed plaintiff's separate source of title for each type of equipment taken from his possession, and stated that the goods were taken by direction of Naval authorities; that the taking was without prejudice to plaintiff's rights, including his full right of compensation; and that the property was taken without requirement of service of a warrant or other process.

[6] 62 Stat. 736, 737 (1948) (now 18 U.S.C. § 793 (1964)).

Disposition of Equipments Seized

22. The 83 Mark 31 Model 1 equipments and the 81 PU/ Mark 31 power supply units repossessed by the Navy Department were destroyed on March 28, 1952, at the New York Naval Shipyard. The 136 Mark 1 Model 2 equipments, also designated CG-46ACX, were sent to the United States Naval Supply Depot at Mechanicsburg, Pennsylvania, shortly after they were repossessed by the Navy Department. The equipments were stored at this place as classified material until they, along with three other of such equipments not taken from plaintiff, were destroyed by mutilation. The one dynamotor power unit taken from the plaintiff was included in a total of 259 identical power units which were reported "Loss By Survey" on a government form (1148M), dated September 30, 1960.

All of the equipment taken from plaintiff by the Navy was treated, after seizure, in accordance with Navy Regulations applicable to classified information.

General Nature of the Equipment

23. Radar is an electronic device for detecting an object by determining its range, its position at azimuth, and sometimes its physical characteristics. A radar system accomplishes this detection by emitting from its transmitter a series of pulses of electrical energy, called a beam or signal, which vary in width and area covered, depending upon the type of antenna employed to transmit the signal. When the beam strikes an object, a portion of the beam is reflected back towards the transmitter of the energy. There the reflected energy is picked up by the antenna of the radar system and sampled by an instrument known as a receiver. The receiver contains circuits which enable it to discriminate the range of the target from the transmitter by noting the delay from the time that the signal emanated from the transmitter until it was reflected back to the receiver. Another circuit in the radar receiver examines the signal strength of the reflected beam and thereby determines if the target is moving and its direction. The emission of the electronic beam from the transmitter is known as "illuminating" the target. All radar

sets have the common function of ranging. All are designed to receive a signal from a target and by precise measurement of that signal, determine the range and bearing of the target. Some radars also have equipment to transmit the signal to the target as well as receive it back.

The Pelican Missile System

24. In 1943 and 1944, a "seeker" or guidance system known as the "Pelican" missile was in the development state. Such a system enables a missile to "home" on a target by taking signals received and translating them into such a form that the missile is directed to fly toward a particular target. The Pelican was the first radar homing missile developed by the United States Navy. The radar portion of the Pelican missile did not contain a transmitter for illuminating a target. Therefore, the Pelican was known as a semi-active, or passive, homing missile; that is, it contained a receiver but no transmitter; it homed on its target by using radar signals emitted by a transmitter carried in an associated aircraft. A radar system which had its own self-contained transmitter was known as an active or self-illuminating type radar. The device described as the "Mark 1 Model 2, Radar Receiver, manufactured by General Electric. U.S. Navy type CG-46ACX * * *," depicted in the upper righthand portion of Bulletin 83A (Defendant's Exhibit No. 1), prepared and circulated by Dubin Electronics Company (findings 15 and 16, *supra*), was one of the three design versions of the receiver for the radar guidance system of the Pelican missile.

25. The Dynamotor Power Unit, CG-211078, for the Mark 1 Model 2 radar receiver, described in the upper righthand portion of Dubin Electronics Bulletin 83A, was the power supply for the radar receiver of the Pelican missile. (See finding 15, *supra.*)

26. (a) While the record is not entirely clear, it appears that pursuant to approved recommendations of proper Naval officials, production on certain radar guided missile projects, including the Pelican project, was terminated sometime late in 1944, "except for such experimental purposes as appear desirable."

(b) The record as a whole supports the conclusion that the use of parts of the three versions of the Mark 1 radar receiver, i.e., Models 1, 2 and 3, subsequently known as SWOD, Mark 1, used in the guidance system for the Pelican missile, particularly the basic designs of the circuitry in these three different models of the receiver unit, was continued by the government in connection with experimental work, research design and engineering relating to various guided missile projects that were either continued, or initiated, by the Navy, and possibly other branches of the Defense Department, during the period 1944 through August 1950.

The Bat Missile System

27. (a) After the Navy discontinued operational production of the Pelican missile late in 1944, the Navy concentrated its efforts to ready a missile known as the "Bat" (on which some initial development work was being carried on at least as early as 1941) for use as a combat weapon. The Bat was an air-to-surface type of homing missile. The Bat carried its own transmitter, so it was independent of an associated aircraft. The Bat was a radar controlled glide bomb; but the guidance system of the Bat was not, strictly speaking, a radar. It was a "missile seeker" which transmitted its own radar signal to a target and then used the reflected signal to guide itself to the target. The missile's nose contained both a radar transmitter and a receiver. The receiver's circuits indicated the direction of the target and electrically flashed its findings to the glider's autopilot, thereby permitting the missile to change course to track a moving target. While the Bat and the Pelican missile radar systems were designed to perform the same result, i.e., guide a glider bomb to its target, the natural advantage that the Bat had over the Pelican was that the Bat had its own self-contained transmitter to illuminate the target, whereas the Pelican could only home on its target by having the mother plane continue in with it close to the target to provide illumination.

(b) While it may be said that commercial radar available to the general public in 1950 and units of the missile seeker here in issue operated on the same basic radar laws applica-

ble at that time, both the Pelican and Bat equipments contained a number of elements not found in commercial radar or on the commercial market; and the function and special characteristics of those homing devices were unknown to the general public during the year 1950.

(c) The device pictured in the upper lefthand portion of Dubin Electronics Company Bulletin 83A, and described as the Mark 31 Model 1, was the radar "S" Band radar equipment, guidance and homing system for the Bat missile. (See finding 15, *supra.*)

28. The radar system of the Bat missile had its own independent power supply. The PU/Mark 31 power supply unit, described in the upper lefthand portion of Dubin Electronics' Bulletin 83A, was the power supply for the radar homing head device system of the Bat missile. (See finding 15, *supra.*)

Similarity of Circuitry in Pelican and Bat Missile Radar Systems

29. The receiver portion of the Pelican and Bat radar missile systems worked in the same manner and performed the same functions. While there were differences in the physical configurations of the two receivers, each contained electronic circuitry which, on receiving a signal reflected from the target, provided a method for presenting the information to a servo mechanism (not a part of the radar system) which, in turn, operated the control surface of the glider's airframe causing it to change course to home on the target. These circuits, known as tracking circuits, were identical in the radar systems of both the Pelican and the Bat missiles.

Navy Security Regulations—Classification of Defense Information

30. (a) When used in connection with the subject of "security", the term "classification" means a decision made by proper authority in the Department of Defense to put a piece of defense information or material into a specific category that then makes it subject to the current regulations regarding safeguarding and dissemination. Information or material which must be safeguarded in the public interest is

classified matter. It follows, therefore, that a decision by proper authority to place particular information or equipment in a classified status also is a decision that such information or equipment bears a certain relationship to the national defense. Items of information and material are classified on the basis of their relative use, capability, and the current state of the art. Up to sometime in 1953, there were four classifications, namely, Top Secret, Secret, Confidential, and Restricted. In 1953 the classification of "Restricted" was discontinued, and the other three said classifications have remained to the present time. Declassified information and material need not be safeguarded in the public interest as relating to the national defense. Prior to 1953, the Navy employed the four above-stated classifications and used the same basic principles and procedures for classifying and declassifying of information and material.

(b) The official originating a piece of information or equipment is responsible for assigning a classification to that information or equipment. The originator is the first classification authority. Only a *senior in command* over the originator can change the classification of an item which has been classified. Once information or equipment has been classified, it cannot be reclassified or downgraded without the issuance of a written instruction, signed by the originator or his senior within the chain of command. Information classified by one agency cannot be changed by any other agency without the permission of the originating agency.

(c) When a piece of material contains classified information, unless it is inappropriate to do so, it must be marked with its assigned classification grade. It does not appear from the record that the equipment in issue was so marked. Notwithstanding the marking requirement that prevails under normal circumstances, some classified material or equipment is not so marked, when it is considered inappropriate for this to be done. Where classified material is not marked, the only evidence of classification is a required piece of paper stating the security classification of the information revealed by the equipment.

(d) Classification is designed to protect an idea or a piece of equipment, relative to its defense application. Information can be revealed either by a document or an object and

the purpose of the classification system is to safeguard information from becoming known to potential enemies of the United States in the interest of national defense. Classification is not directly concerned with classifying physical objects, but only attempts to protect the information which these objects could convey. Theoretically, even information which is within the public domain might be classified by the Armed Services, including information published in a newspaper, or in a trade journal. For example, an article appearing in the New York Times, which is then clipped out and removed, might be classified.

JANAP SERIES OF PUBLICATIONS

31. (a) There was received in evidence the so-called JANAP (Joint Army Navy Air Force Publication) series of publications, identified as JANAP 140(A), dated November 1948 (Defendant's Exhibit 24), and the following supplements thereto: JANAP 140(A)-3, dated February 1950 (Defendant's Exhibit 25); 140(A)-4, dated August 1950 (Defendant's Exhibit 26); and 140(A)-5, dated April 1951 (Defendant's Exhibit 27). The above-identified documents are described as "Security Classifications of Electronic Equipment," and were approved and published by authority of the Joint Chiefs of Staff, Joint Communications—Electronics Committee, Washington, D.C. Each of those publications was marked "Original," "Nonregistered" and "Restricted."

(b) Page vii, entitled "Introduction," of JANAP 140(A) (Defendant's Exhibit 24), *supra*, states that the document lists the official security classification assigned to all items of electronic equipment by the Army, Navy and Air Force prior to June 1, 1948; that it supersedes prior publications; and that "Many unclassified items of equipment that have been cancelled or declared obsolete have not been included herein."

The data in this publication is divided into five sections, the following three of which are considered by plaintiff to be relevant to this action: Type numbered items having Joint Army-Navy Nomenclature, Navy Model Letter and Type Number System, and Electron Tubes. Each section contains

a columnar display of information listing data concerning equipments by number, letter, or number and letter combinations, as follows: (1) Type number; (2) Item name; (3) Security classification; and (4) Cognizant agency.

In the Security Classification Column, the following key is used for security classification: "S: Secret, C: Confidential, R: Restricted, and U: Unclassified." The Security gradings shown for the section where the type number is based upon Navy Type Model Letter and Type Number System, *supra*, apply not only to the equipment itself which is listed in the document, but also to the following matters, *inter alia*, relating to the equipment: (1) Specifications which include technical and performance details; (2) Special techniques and/or frequencies; (3) Circuit diagrams and drawings; and (4) Installation drawings which disclose information on the internal construction and design principles.

Paragraph 11 of said Introduction states that "Comments concerning corrections, additions, or changes should be addressed to the Communications—Electronics Nomenclature Working group at the Pentagon, Washington, D.C." The above statement appears in all of the other JANAP publications mentioned, *supra*.

(c) Appendix D of JANAP 140(A), entitled "Explanation of the Navy Type Designation System," *supra*, reads in pertinent part:

> Navy type designations are assigned to denote major units and also to most component parts likely to require replacement during the normal life of the equipment involved. * * *

Navy type designations for equipment are either a numerical system or an alphabetical system. In the numerical system the equipment is designated by Navy type number (e.g., 21426) and a group of prefix letters to indicate the manufacturer of the item (e.g., CG). Once prefix letters are assigned to a manufacturer, the same designating prefix letters remain the permanent identification of that manufacturer and precede the Navy type numbers of all equipment produced by that manufacturer. The alphabetical system of Navy type designations is used for units peculiar to radar equipments. The alphabetical system is the same as the numerical system

except that the last three or four digits of the Navy type number are replaced with alphabetical letters. (E.g., if equipment 21426 was a radar equipment, it would be designated 21ABC, and the particular equipment would be preceded by the manufacturer's prefix letters, viz. CG-21ABC.) The fundamental principles governing the application of both systems of Navy type designations are the same.

32. Defendant's Exhibits 25, 26 and 27 (finding 31(a), *supra*) are supplements to Defendant's Exhibit 24 (*ibid.*) and are designed to be used in connection therewith. Items in these supplements evidence changes, including additions and deletions, in the classification of equipment listed in Defendant's Exhibit 24 through February 1951. Thus, Defendant's Exhibit 25 covered such changes through January 16, 1950; Defendant's Exhibit 26 covered such changes through August 1, 1950; and Defendant's Exhibit 27 covered such changes through February 1, 1951.

33. The Joint Communications-Electronics Committee of the Joint Chiefs of Staff that published the JANAP series of documents (findings 31 and 32, *supra*) was composed of representatives of the several branches of the Armed Forces within the Department of Defense. It is reasonably clear that all divisions concerned with electronic equipment within each of the military departments in the Department of Defense made submissions to the committee, either directly or through the working groups thereof, for compilation and agreement on the current classification of each piece of equipment listed in the documents prior to their publication.

34. The JANAP series of documents is a quick and ready reference used by the Department of Defense to determine what classification has been assigned to particular material by the originator thereof. The security officer and personnel in the Classification Office of the Bureau of Naval Weapons, Department of the Navy, use these documents when questions arise as to the proper security classification of equipment not under said Bureau. The series has the full force and effect of multi-department regulations of the Department of Defense. However, the documents do not actually classify or declassify the equipments and information contained therein.

35. (a) The Mark 1 Model 2, "S" Band radar equipment taken from plaintiff's possession by the Navy Department is not listed in the JANAP series of publications (Defendant's Exhibits 24, 25, 26 and 27—see finding 31(a), *supra*) as electronics equipment subject to any security classification, under the nomenclature "Mark 1 Model 2." On page 462 of JANAP 140–A, dated November 1948 (Defendant's Exhibit 24—*ibid.*), there is listed an unclassified item of equipment described as "radio receiver," type "46ACX," with the cognizant bureau shown as being the Bureau of Ordnance. None of the other publications in the JANAP series (Defendant's Exhibits 25, 26 and 27, *ibid.*) contain listings for the "46 ACX" nomenclature which shows that there was no change in the unclassified status of that particular equipment from June 1, 1948 through February 1, 1951. The JANAP series of documents, *supra*, does not list equipment designated "CG–46ACX."

(b) The record does not support a finding that the equipment designated as type "46ACX" is the same as the equipment listed on Defendant's Exhibit 1, *supra*, as the Mark 1 Model 2, radar receiver, manufactured by the General Electric Company "U.S. Navy Type CG–46ACX." There is no probative evidence connecting the 46ACX equipment listed in JANAP, 140(A), dated November 1948 (Defendant's Exhibit 24), *supra*, with the equipment purchased by plaintiff.

(c) It is a fact that under date of August 16, 1943, the Chief of the Bureau of Ships sent a letter (classified "Confidential") to the General Electric Company, Bridgeport, Connecticut, that refers to "Radio—Contract NOrd–965 for Radio Receiver Mark 1 Mod ( ) [no model number appears in this space]—General Electric Company, Schenectady, New York, Contractor * * *," and assigns Bureau of Ships Navy type designations to certain items including, *inter alia*, type designation "CG–46ACX" to a "Radio Receiver," and type designation "CG–211078" to a Dynamotor Power unit described therein which it appears from note references in said letter are related to the radio receiver as accessory equipment.[7] It also is true that the first two prefix letters "CG" in the Navy type designation stood for

[7] This letter is in evidence as Plaintiff's Exhibit No. 48.

the manufacturer, General Electric Company, and were on the radar receivers seized by the Navy Department, and that in 1944 the prefix letters "CG" associated with Navy type designations were the designation for the General Electric Company as the manufacturer of the equipment. However, it should be noted that no prefix letters appeared in connection with the listing on page 462 of Defendant's Exhibit 24, *supra*, of the radio receiver, design type "46ACX," and the manufacturer of NOrd type 46ACX equipment cannot be determined from that listing. Therefore, it cannot be concluded that such equipment is the same as the equipment assigned Navy type designation "CG–46ACX," because other companies may have manufactured "46ACX equipment" which possibly was similar to, but not necessarily identical with, equipment type designated CG–46ACX. Furthermore, the record will not support a finding that the equipments referred to in the Bureau of Ships letters, *supra*, retained said nomenclatures throughout their existence during the experimental periods that continued through August 1950. On the contrary, considering the record as a whole, it is found that the equipment depicted in Defendant's Exhibit No. 1 as the Mark 1 Model 2 radar receiver (see findings 15 and 24, *supra*) was a radar receiver sub-system of the Pelican Missile system which was manufactured by the General Electric Company and became known as "SWOD Mark 1, Model 2," and that the latter designation was the proper one for the equipment depicted in Defendant's Exhibit No. 1, as the Mark 1 Model 2 radar receiver. On page 406 of Defendant's Exhibit No. 24 (see finding 31(a), *supra*) there is listed a number of models of equipment, including, *inter alia*, equipment named "SWOD Mark 1 Mod 2," [8] which is shown as being stamped Restricted and under the cognizance of the Bureau of Ordnance.

36. The accessory Dynamotor Power unit, type CG–211078, for the Mark 1 Model 2 radar receiver, is not listed, in an identifiable manner, in the JANAP series of publications (Defendant's Exhibits 24, 25, 26 and 27—finding 31(a), *supra*) as electronic equipment subject to any security classification.

[8] Other models listed include, *inter alia*, equipment named "SWOD Mark 1 Mod 1" and "SWOD Mark 1 Mod 3," both of which also are shown as being classified Restricted and under the cognizance of the Bureau of Ordnance.

However, the foregoing fact is an insufficient basis for concluding that said power unit was not classified during the period prior to June 1, 1948 through February 1, 1951. There are a number of possible reasons why the power unit was not included in the series, e.g., typographical error, inadvertent or deliberate omission, transfer of the material from the Navy to the Army; but it is unnecessary to make speculative findings with respect to the reasons why the unit is not listed because the record clearly shows that it was an integral part of the Mark 1 Model 2 radar system which, as a whole, including the power supply, was originally classified equipment and remained classified beyond August 1950. Furthermore, as indicated in finding 34, *supra*, the JANAP series is simply a ready reference source used to quickly determine what classification, if any, has been assigned to a particular piece of equipment, and there are many reasons why certain equipment is not included in the compilation.

37. (a) Neither the Mark 31 Model 1, "S" Band radar equipment, nor the accessory PU/Mark 31 power supply unit therefor, are listed in the JANAP series of publications (Defendant's Exhibits 24, 25, 26 and 27, *supra*) under those respective nomenclatures. However, for reasons similar to those set forth in finding 38, *infra*, the foregoing fact is an insufficient basis for concluding that said radar equipment and power unit were not classified during the period prior to June 1, 1948 through February 1, 1951.

(b) The record shows that the Mark 31 Model 1, "S" Band equipment, *supra*, was the radar guidance system for the Bat missile (see finding 27, *supra*); that one version of the Bat namely, the "Bat-0," was known by the nomenclature "ASM-N-1"; that another version of the Bat, namely the "Bat-1," was known as ASM-2"; that the Bat also was described under its Army-Navy classification as the "AN/DPN-1." Type "AN/DPN-1" and type "AN/DPN-2" radar sets are listed on page 27 of Defendant's Exhibit 24, *supra*, and are shown as being classified Confidential in November 1948. Defendant's Exhibits 25, 26 and 27, *supra*, do not contain listings of equipment identified by the nomenclature AN/DPN-1 or AN/DPN-2; therefore, it may be reasonably assumed, in the absence of other evidence to the

contrary, that said types of equipment remained classified Confidential beyond August 1950.

(c) The record also shows that the PU/Mark 31 power supply unit, *supra*, was the accessory power unit for the Mark 31 Model 1, "S" Band radar equipment, *supra*, and that said power unit was an integral part of the Mark 31 Model 1 guidance system equipment which, as a whole, including the power supply, was originally classified material and remained classified beyond August 1950.

38. None of the tubes included as component parts of the Mark 31 Model 1 guidance system equipment device, the PU/Mark 31 power supply units accessory thereto, or the Mark 1 Model 2 radar receivers, Navy type CG-46ACX, are listed in Defendant's Exhibits 24, 25, 26 or 27, *supra*, as tubes subject to any security classification. Four of the tubes in the Bat missile equipments, including types "721-A," "1B29," "726-A," and type "2J39" which was the magnetron of the Bat radar, are listed in Defendant's Exhibit 24 as "unclassified" items. Two of the tubes in the Pelican missile equipments, including type 1N21, and type 2K28 which was the Klystron of the Pelican radar, each of which respectively determined the frequency on which each radar guidance system operated, also are specifically listed in Defendant's Exhibit 24 as unclassified items. Insofar as is shown in the JANAP series of publications (finding 31(a), *supra*), none of the above-identified tubes were specifically subject to a particular security classification on the dates the equipments containing such tubes were repossessed from plaintiff by the Navy. However, this does not necessarily mean that these tubes were not actually classified.

It is unnecessary for the individual component parts of a particular piece of equipment to be classified in order for the equipment, as a whole unit, to be subject to a security classification. Credible testimony was presented to that effect by the Security Officer of the Bureau of Naval Weapons who also stated in substance and relevant part that, in connection with the production of a particular weapon or weapons system, a security requirements checklist is prepared and at that time a determination is made as to whether any given component may be classified by its use in the produc-

tion of the weapon or weapon system; that it is unnecessary that the components be in close physical proximity to each other; and that the mere fact that defense personnel order certain component parts, or are using them, could be a subject of classification, even though such parts are offered for sale, and purchased by members of the public.

Classification of Seized Equipment

39. The guidance system equipments of the Pelican missile, i.e., the 136 Mark 1 Model 2, "S" Band radar receivers, Navy type CG–46ACX, and the one associated Dynamotor Power unit, CG–211078, seized from plaintiff were manufactured for the Navy Department by the General Electric Company under Contract NOrd–965. Originally the equipments were classified "Secret." That classification was reduced to "Confidential" in January 1944, and to "Restricted" in September 1946. The equipments remained restricted until 1953, when Executive Order 10105 abolished the "Restricted" classification, at which time the equipments became classified "Confidential." Thus, it is apparent that the equipments were classified "Restricted" during the time material herein, i.e., July and August, 1950.

40. The guidance system equipments of the Bat missile, i.e., the 83 Mark 31 Model 1, "S" Band radar transmitter-receiver units, and the 81 associated PU/Mark 31 power supply units, seized from plaintiff were manufactured for the Navy Department by the Western Electric Company under contract NOrd–4810. This project was originally classified "Secret." Subsequently, that classification was reduced to "Confidential," and it remained in the latter classification through and beyond August 1950.

Relationship of Equipments Involved to the National Defense

41. Possession of the radar guidance and homing system of the Bat missile, i.e., the Mark 31 Model 1, "S" Band radar equipment, by a potential enemy in 1950, would have compromised the entire guidance system of said missile, and probably would have enabled such an enemy to successfully defend against the use of this weapon by developing a

counter-measure system. A skilled expert in electronics engineering in possession of this equipment could reconstruct circuit diagrams and, with such diagrams, would be able to determine how the system worked and build similar circuits. Such an expert would be able to ascertain from physical examination of the guidance system, *inter alia*, the coding associated with transmissions, the method or technique of using this code information to track an interception target, and the tracking device which was the only one of its type in 1950. There is little doubt that possession of the equipment would have given valuable advanced technical information concerning missile guidance systems then in use not otherwise available to an unfriendly foreign power. Such a potential enemy could not have deduced the classified components of this equipment simply by viewing the pictures and descriptive data relating thereto shown in the left-hand corner of Defendant's Exhibit 1, *supra*.

42. The Bat missile was an operational weapon of the United States defense arsenal during August 1950; and it was utilized for training purposes with a view on the part of the military to use the weapon in the Korean conflict. Therefore, the Bat missile system, i.e., the Mark 31 Model 1, radar equipment, including its associated PU/Mark 31 power supply unit, was a weapon related to the national defense. As noted in finding 19, *supra*, on or prior to August 19, 1950, the Bureau of Aeronautics of the Navy Department expressed the opinion that this equipment related to the national defense within the meaning of the Espionage Act, 18 U.S.C. § 793.

43. Electronic circuits similar to those in the Pelican missile were also used in Navy missiles, such as the PETREL, PUFFIN and the CORVUS. Like the guidance system of the Bat, the Pelican radar guidance system contained certain elements not found in commercial radar during 1950.

44. In August 1950, the guidance system of the Pelican missile, i.e., the Mark 1 Model 2, "S" Band radar receiver, represented an advanced state of the art probably unequalled in its capability by any other homing system then in existence, with the exception of the Bat guidance system.

45. Although the Pelican missile was not operational during 1950, possession of its guidance system would have re-

vealed important technical information concerning the guidance systems of then operating missiles, such as the BAT, PETREL, PUFFIN and CORVUS. Furthermore, its possession would have advanced the missile guidance technology of a potential enemy. Therefore, the Mark 1 Model 2, "S" Band radar receivers seized from plaintiff were related to the national defense during August 1950.

II

DAMAGES

46. Plaintiff paid $1,600 for the PU/Mark 31 power units, $15.00 for the dynamotor power unit, and $3,162.62 for all of the articles contained in Lot 23, making a total of $4,777.62 paid by plaintiff for all of the equipments repossessed by defendant and certain other items included in Lot 23 which were not repossessed. The record does not disclose the number, or provide any basis for a finding as to the value of the scanner mounts, radar indicators, inverters, antennas and other items of equipment included in Lot 23 sold to plaintiff which were not repossessed from him by defendant. Thus, plaintiff paid a total of $4,777.62 for the equipments repossessed by defendant, less the value of the remaining equipment contained in Lot No. 23 and not repossessed by defendant. In connection with the foregoing, it should be kept in mind that at no time has the defendant ever shown the value of the remaining articles in Lot 23 which were not repossessed from plaintiff, or taken the position that it is unwilling to pay the full $3,162.62, or seriously claimed that it should pay less than $3,162.62 because some of the items in Lot 23 were not repossessed.

As a result of an "all or nothing"—market value theory of recovery approach chosen by plaintiff, there is no evidence in the record with respect to costs which he may have incurred incidental to the transactions involving the equipments which the defendant repossessed. However, prior to trial the parties stipulated, *inter alia*, that "* * * all recitals of fact, incorporated in the opinion of the Court of Claims on the respective motions of the parties for summary judgment [*Dubin* v. *United States*, 153 Ct. Cl. 550, 289 F. 2d 651 (1961)] * * * are acknowledged by the respective parties to be true and correct, except to the extent modified, altered

or disclaimed in the ensuing provisions of this stipulation; * * *."

It was stated in *Dubin* v. *United States*, *supra*, at 552, that "the plaintiff negotiated with Fair Radio Sales and bought 80 power units for $1,600 *and paid $173.86 freight to have them shipped to plaintiff's warehouse in New York.*" [Emphasis supplied.]

In view of the stipulation of the parties, *supra*, and that the above-quoted recital of fact was not "modified, altered or disclaimed" in the ensuing provisions of said stipulation, said fact that plaintiff paid $173.86 in freight charges to have them (the 80 power units) shipped to the plaintiff's warehouse in New York is found to be true. The amounts paid by plaintiff for the 80 power units and for the dynamotor were paid about ten days before repossession by defendant in arm's-length transactions between a willing buyer and a willing seller, and these amounts are found to be the market value of them when repossessed by defendant.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover of and from the United States, and judgment is therefore entered for plaintiff in the amount of four thousand nine hundred fifty-one dollars and forty-eight cents ($4,951.48).

U.S. GOVERNMENT PRINTING OFFICE 1966

APPENDIX B

In the United States Court of Claims

No. 68–55

(Decided May 3, 1961)

MORRIS DUBIN v. THE UNITED STATES

George I. Harris for the plaintiff. *Burke & Burke* and *Frank X. O'Donnell, Jr.* were on the briefs.

Martin E. Rendelman, with whom was *Assistant Attorney General William H. Orrick, Jr.*, for the defendant. *Parker J. Stone* was on the briefs.

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

MADDEN, *Judge*, delivered the opinion of the court:

In August, 1950, the plaintiff had in his possession a large number of transmitter-receiver radar equipment units, direct current power units, and radio receivers. The Government, acting through officials of the United States Navy, required the plaintiff to turn possession of this property over to the Government. The plaintiff is suing the Government for $85,612.50, which, he asserts, was the fair market value of the property. He says that, in the circumstances, there was a contract implied in fact that the Government would pay for the property. He says, in the alternative, that the property was taken from him for public use and that, under the Fifth Amendment to the Constitution of the United States, he is entitled to just compensation for the taking, and that just compensation would be $85,612.50.

We narrate the circumstances under which the plaintiff came into possession of the property. Some time before July 1, 1950, the Government announced a sale of Government surplus property to be conducted at Dayton, Ohio,

from July 5 to July 11. The plaintiff went to Dayton, examined the property and entered sealed bids for certain lots of the property. The plaintiff was the high bidder for four lots. The Government accepted the plaintiff's bids and prepared contracts of sale on Government forms. The contracts were signed by the parties and the goods were delivered to the plaintiff. As to three of the four lots of goods, there has been no problem. The present suit relates to lot No. 23, and to certain other property bought by the plaintiff from other persons. The plaintiff paid $3,162.62 for lot No. 23, and paid the cost of its transportation from Dayton to New York.

When the bids were opened on July 11, the plaintiff learned that another bidder, Fair Radio Sales, had bought 80 direct current power units which were, in fact, accessories of the radar equipment units, 83 of which the plaintiff had bought in his lot No. 23. The plaintiff negotiated with Fair Radio Sales and bought the 80 power units for $1,600 and paid $173.86 freight to have them shipped to the plaintiff's warehouse in New York.

About August 10, 1950, the plaintiff purchased from Western International Company one Dynamotor-Power Unit.

During the latter part of July 1950 the plaintiff prepared a bulletin advertising for sale the goods described above. Some 11,000 of these bulletins were mailed to the trade. On August 16 a Mr. Redstone of the office of the Inspector of Naval Material at the New York Naval Shipyard, together with a Naval Intelligence Officer, came to the plaintiff's office and demanded that all sales and advertisements for sale, of the property here in question, cease. A few days later a Lieutenant-Commander who was a legal officer of the Naval District, asserted to the plaintiff that the property in question was "classified" and that the plaintiff's possession of it was in violation of the Espionage Act. On August 19th, 23d and 24th the property was taken by the Navy and receipts were given the plaintiff stating that the transaction was without prejudice to any rights of the plaintiff including the "full right to compensation therefor." The Korean police action had just commenced and the plaintiff was,

naturally, alarmed at the suggestion of espionage, and for that reason allowed the Navy to take the property.

The plaintiff presented his claim for $85,612.50 to various officials of the Government. The claim was denied. The Government offered to refund to the plaintiff the purchase price of lot No. 23, which offer the plaintiff rejected. In its brief the Government in effect concedes that the plaintiff should be paid the cost to it of the property, and transportation charges.

The Government says that the plaintiff's claim is invalid, and gives a number of reasons for that conclusion. It says that the property was not subject to sale as surplus, because it was "classified," and a Navy regulation forbade the sale of classified material without prior mutilation. The Government does not give us any citation to any document classifying the particular property here in question, or property of that type. Further, a part of the property in question was not bought by the plaintiff from the Government. It was bought from third persons. As to the third lot in question we are not told whether the Government ever owned it.

The Government says that the plaintiff's contract of sale contained a "Use Warranty" paragraph warranting that he would not resell the purchased property at a profit. It says that the plaintiff's immediate offer of the goods for resale shows that he, at the time of his purchase, intended to violate this warranty and that his purchase was therefore invalid. This defense would apply only to the lot of goods purchased by the plaintiff from the Government.

The Government points to section 793 of the Espionage Act, 62 Stat. 736, 737, 18 U.S.C. (1946 ed., Supp. III) § 793, as it read at the time here in question. The Act said:

> Whoever, lawfully or unlawfully having possession of, access to, control over, or being intrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, willfully communicates or transmits or attempts to communicate or transmit the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it * * *

> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

If this statute is applicable, it is important. It would seem that the items in question were "instruments" or "appliances" "relating to the national defense." The plaintiff says in his reply brief:

> Of course there is absolutely no proof on the instant motions that the property seized from the plaintiff was an instrument or appliance "relating to the National Defense."

The plaintiff then goes on to argue that even if the goods did relate to the national defense, that might make the officer who sold the goods to the plaintiff a criminal, but would not impair the validity of the plaintiff's title to the goods and his right to compensation for the Government's taking of them.

The plaintiff's interpretation of the statute is too narrow. The statute says that if one "lawfully or unlawfully having possession * * * wilfully retains the same and fails to deliver it on demand to the officer * * * of the United States entitled to receive it" he shall be fined or imprisoned. Assuming, then, for present purposes, that the devices did relate to the national defense, the plaintiff, though lawfully in possession because of a mistake made by the Government employees at Dayton, had no right to keep possession of the property, and his keeping it, after its surrender had been demanded, would have been a serious crime. Nothing in Public Law 152 of the 81st Congress, 40 U.S.C. § 484(d) could be construed or could have been intended to protect a possessor of property covered by the quoted section of the Espionage Act. Section 484(d) says:

> A deed, bill of sale, lease or other instrument executed by or on behalf of any executive agency purporting to transfer title or any other interest in surplus property under this title shall be conclusive evidence of compliance with the provisions of this title insofar as concerns title or other interest of any bona fide grantee or transferee for value and without notice of lack of such compliance.

This section was intended to protect purchasers against the peril of failure on the part of the selling officers of the Government to take all the preliminary steps required by the

statute to make the property available for sale to the public. It could not have been intended to make it lawful, in the face of the Espionage Act, for one to hold on to national defense devices which he had purchased because of a mistake on the part of the selling official.

The plaintiff urges upon us our decision in the case of *Turney* v. *United States*, 126 Ct. Cl. 202. So far as appears, there was no Espionage Act, at the time of the Turney controversy, comparable to the one here involved. The Government's brief in *Turney* contained this single statement on that subject:

> * * * here the radar was classified military equipment, the disposal of which might have caused criminal prosecution of any American who participated in such disposition, see 50 U.S.C. 32.

The statutory reference was to the 1946 edition of the United States Code, and the cited section covered only cases of persons who, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicate information or deliver articles to a representative of the foreign nation. The maximum punishment was set at 20 years' imprisonment in peacetime and death in wartime. There was nothing in 50 U.S.C. § 32 which related to the facts of the *Turney* case, or of the instant case. There was nothing in the section which affected the interpretation of section 484(d), quoted above, herein, and relating to the title which one received when he purchased at a Government sale.

Persisting, then, in our assumption that we are dealing with devices relating to the national defense, the plaintiff's title and possession were completely vulnerable. All that was needed to destroy them was an official demand that possession be surrendered. The refusal of the demand would have been a serious crime. The plaintiff did not refuse. Was he entitled to compensation for the property which he surrendered? If a statute makes unlawful the possession of narcotics, or spirituous liquors, or firearms, and they are seized by lawful authority, the possessor is not entitled to compensation for their loss, unless a statute pro-

vides for compensation. We suppose that the same is true of national defense devices which it is unlawful to keep.

If the possessor who has no right to keep possession of the property has come into its possession as a result of a mistake by Government officials in selling the property to him, he has an urgent equity in the direction of getting a refund of his direct out-of-pocket expenditures in the abortive transaction. In the instant case that thought would apply to lot No. 23, which the plaintiff bought at the Government sale. We think it would also apply to the goods bought by the plaintiff from Fair Radio Sales which had just bought them at the same Government sale. We assume that the Government is willing to do what Government counsel in their brief say is "the most that plaintiff would be entitled to."

If there is a genuine controversy as to whether the articles here in question related to the national defense, so that the parties cannot stipulate the answer to that question, the case will have to go to trial, the trial to be limited to that issue. If that issue is resolved without trial, the court will consider the case further upon motion of either party.

The motions of both parties are denied, with leave to renew in the event that a stipulation is made as to the relation of the articles in question to the national defense.

It is so ordered.

DURFEE, *Judge;* LARAMORE, *Judge,* WHITAKER, *Judge;* and JONES, *Chief Judge*, concur.

U.S. GOVERNMENT PRINTING OFFICE: 1961

United States Court of Claims

MORRIS DUBIN

No. 68-55

vs.

THE UNITED STATES

At a Court of Claims held in the City of Washington, on the ---15th--- *day of* ------July---------, *A. D. 19* 66, *judgment was ordered to be entered as follows:*

IT IS ADJUDGED AND ORDERED that plaintiff recover of and from the United States pursuant to the court's opinion and findings of fact entered this date the sum of four thousand nine hundred fifty-one dollars and forty-eight cents ($4,951.48).

A true copy of record.

In testimony whereof *I have hereunto set my hand and affixed the seal of said Court at Washington, this* --------18th-------- *day of* ----------July---------, *A. D. 19* 66

Clerk, Court of Claims.

Attest:

Chief Judge.

Attorney of Record.
One Wall Street
New York 5, New York

U. S. GOVERNMENT PRINTING OFFICE 16—43174-3

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 866

MORRIS DUBIN, PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of a $4,951.48 judgment in his favor rendered by the Court of Claims as compensation for the taking of certain equipment by the Navy Department. He argues that the amount of the judgment is inadequate and falls short of "just compensation" within the meaning of the Fifth Amendment.

1. In July 1950 petitioner purchased from the Air Force as surplus property a quantity of radar transmitter-receiver units and radar receivers at a price of $3,162.62 for the entire lot (Pet. App. 3a, 7a), which was delivered to petitioner on July 30, 1950 (Pet. App. 3a). In his contract of sale with the Air Force petitioner warranted that he would "not resell [the

instruments] at a profit" (Pet. App. 7a, 13a). However, on August 8 and 10, 1950, he purchased from private suppliers, at a total price of $1615.00, certain power units to be used with the radar transmitter-receiver units and radar receivers (Pet. App. 3a), and between August 11, 1950, and August 16, 1950, petitioner circulated to his customers an advertising bulletin offering the complete units for sale at prices greatly in excess of what he had paid (Pet. App. 3a–4a). As the Court of Claims found, "these items offered for sale had been altered by plaintiff in no particular, but were offered for sale in the cartons in which they were packed when plaintiff purchased them" (Pet. App. 3a).

Several days later the Navy Department informed petitioner that there had been a security violation and that the radar equipment purchased from the Air Force, as well as the power units purchased privately were "classified" and "related to the national defense" within the meaning of the Espionage Act, 18 U.S.C. 793 (Pet. App. 16a). As authorized by 18 U.S.C. 793(d), the Navy Department demanded that petitioner deliver the equipment to the Navy. Petitioner complied, and on August 19, 23, and 24, the Navy took possession of the equipment. (Pet. App. 4a, 16a–17a.)

Petitioner later instituted this action against the United States for the fair market value of the equipment. The Court of Claims initially filed an opinion denying the motions for summary judgment of both parties. (Pet. App. 1b–6b). After a trial the court filed a second opinion, holding that a judgment re-

turning petitioner's out-of-pocket expenses of $4,951.48 constituted "just compensation" (Pet. App. 1a–8a).[1]

2. Petitioner argues that the Court of Claims held that he was not entitled to "just compensation" or "fair value" for the equipment seized.

We do not so read the Court of Claims' decision. In its second opinion the Court of Claims first found that the equipment seized "related to the national defense" within the meaning of the Espionage Act, 18 U.S.C. 793, and, further, that the equipment was "classified" (Pet. App. 4a–7a). From this the court concluded that—in light of 18 U.S.C. 793(d)—petitioner's title was vulnerable to a demand for possession by the government (Pet. App. 7a). The court then turned to petitioner's argument that he was entitled to the fair market value of the property taken (Pet. App. 7a). The court did not hold that petitioner was not entitled to "fair market value" or to "just compensation," but merely that in the circumstances petitioner's out-of-pocket expenses were the appropriate measure of "market value" and "just compensation" (Pet. App. 7a–8a). The court reasoned that the warranty clause in the contract of sale between the Air Force and petitioner, whereby petitioner warranted that he would not resell the purchased property at a profit, "limited the sales price which plaintiff could charge for any of the property which he purchased under the contract to his cost. We think it necessarily follows that it also limited the amount

[1] Judge Davis filed a separate concurring opinion (Pet. App. 8a–9a).

which the defendant was required to pay upon repossession of the property" (Pet. App. 7a).

With respect to the power supply units petitioner purchased from private suppliers, the court held that, since they were purchased "in arm's-length transactions between a willing buyer and a willing seller only eleven days before repossession by defendant, what plaintiff paid would seem to be the market value of these articles" (Pet. App. 8a). The court thus included in its judgment the sums that petitioner had paid for the equipment and added $173.86 representing freight costs incurred by petitioner. They were the only costs disclosed by the record. (Pet. App. 32a–33a.) The total of all of these amounts—$4,951.48—was held to be "under all the circumstances * * * just compensation to plaintiff * * *." (Pet. App. 8a.)

The only issue actually presented is, thus, a highly limited and essentially factual one—whether, in the circumstances, $4,951.48 represented the fair market value of the property seized. Review of that question by this Court is not warranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FEBRUARY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967